UNITED STATES DEPARTMENT OF JUSTICE

Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C.

Dear Senator:

This is in response to your request for the views of the Department of Justice concerning the bill (S. 1489) "To amend title 28 of the United States Code to provide for certain judicial review of administrative removals and suspensions of Federal employees."

The bill would amend chapter 85 of title 28, United States Code, entitled "District Courts; Jurisdiction". Under present law, an action for reinstatement may be brought only in the District Court for the District of Columbia. See Blackmar v. Guerre, 342 U.S. 512 (1952); Marshall v. Crotty, 185 F. 2d 622 (1 Cir. 1950); 28 U.S.C. §1391(b); Rule 4(d)(5), F.R. Civ. P. The purpose of this bill is to extend the jurisdiction of the district courts, amend the venue provisions and alter the service of process rules to permit such actions to be brought in the district in which the employee is employed, as well as in the District of Columbia. The Department of Justice makes no recommendation on the question of whether actions for reinstatement or restoration should be permitted in districts other than the District of Columbia.

Under present law actions for back pay must be brought in the Court of Claims; the district courts have no jurisdiction over such actions. 28 U.S.C. §§1346(a)(2), 1491. The Department makes no recommendation on this bill insofar as it enables an employee to obtain complete relief -- reinstatement and back pay -- in one action in the district court.

It should be noted, however, that the bill also would permit actions for back pay alone to be brought in the district courts. There appears to be no reason for burdening the district courts with these cases where the issue of reinstatement already has been administratively determined. When an employee is reinstated on the ground that his removal was unjustified, he automatically becomes entitled to back pay. 5 U.S.C. §652(b). The employee would have to bring an action for back

pay at this point only if there remained an incidental question such as whether or not he was entitled to overseas allowance, sick or vacation leave or the amount of set-off for other earnings during the period. See e.g., Kalv. v. United States, 124 F. Supp. 654 (Ct. Cl. 1954); Kaufman v. United States, 93 F. Supp. 1019 (Ct. Cl. 1948). The logical forum for determining these specialized and usually minor matters is the Court of Claims which has developed an expertise with respect to them.

Nor is it likely that a decision of the Court of Claims on back pay would be inconsistent with a decision of the district court on reinstatement involving the same employee. The Court of Claims must award back pay when the employee has been reinstated in accordance with an order of the district court. 5 U.S.C. § 652(b); Green v. United States, 124 Ct. Cl. 186 (1953). By the same token, the Court of Claims has held that an employee denied reinstatement by the District Court may not maintain an action for back pay in the Court of Claims. Edgar v. United States, 171 F. Supp. 243 (Ct. Cl. 1959); Larsen v. United States, decided March 4, 1959, not yet officially reported.

The third paragraph of the bill, providing for "action against the appropriate officer or agency" may be ambiguous. Under present law most of the agencies of the United States may not be sued and actions for reinstatement must be brought against the agency head. Actions for back pay must be brought against the United States. 28 U.S.C. §§1346(d)(2), 1491. The Supreme Court has stated that it will not find that Congress has authorized one of its agencies to be sued eo nomine unless "it does so in explicit language." Blackmar v. Guerre, 342 U.S. 512 (1952). It is not clear whether or not the provision in the bill for suits against the "appropriate" agency would enable an agency to be sued eo nomine in reinstatement and back pay cases.

The provision that permits service of process anywhere in the United States changes the present rule with respect to the territorial limits of effective service without adding to the effectiveness of the bill. Rule 4(d)(5) of the Federal Rules of Civil Procedure provides that service of process upon an officer of the United States shall be made by delivering a copy of the summons and complaint to such officer. Thus, even if service were permitted anywhere in the United States, in most instances service upon an agency head still would have to be made in the District of Columbia because that is the only place the summons could be delivered. Agency heads are ordinarily the only officers against whom relief can be obtained in reinstatement cases. Blackmar v. Guerre, supra. The only effect of this provision would be to permit harassment of such officers by subjecting them to service while they are traveling away from their offices in the District of Columbia.

Nor is it necessary to alter the effect of Rule 4(f) which limits service of process to the state in which the district court is held. It is suggested that the purpose of the bill could be accomplished more effectively by inserting a provision similar to Rule 4(d)(4) which provides for service upon the United States attorney for the district in which the action is brought.

The bill is limited to actions brought by employees in the Executive branch. The Committee may wish to consider whether or not it should apply to all employees in the classified civil service as well as to executive employees.

Finally, the measure is ambiguous with respect to the scope of judicial review contemplated. At the present time the District Court for the District of Columbia, which is the only court having jurisdiction over reinstatement cases, will review the actions of executive officials in discharging executive employees only to insure that the relevant procedural requirements were complied with. Scanwell v. Young, 240 F. 2d 865 (D. C. Cir. 1956). Similarly, in back pay cases the Court of Claims will not pass upon the merits of the charges against an employee but only will review the procedural aspects of the case. Wittner v. United States, 76 F. Supp. 110 (Ct. Cl. 1948). This bill apparently is intended to retain these limitations in the law by providing that nothing in the bill "shall affect the scope of review of any court." But the bill would extend jurisdiction to review reinstatement and back pay cases to courts that heretofore could not review these cases to any extent. It would be more desirable, therefore, to state expressly the extent of the scope of review contemplated by the bill.

Incidentally, it is noted that the measure refers to the "District Court for the Territory of Alaska". This reference will require amendment in view of Alaska's statehood.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

Lawrence E. Walsh
Deputy Attorney General